STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSE O. ROMERO	)	
	)	
VS.	)	W.C.C. 02-04080
	)	
BUILDING ONE SERVICE SOLUTIONS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge denying his original petition for workers' compensation benefits arising from a fall while at work on April 7, 2002. After careful review of the record and consideration of the arguments of the parties, we grant the employee's appeal, and reverse the decision of the trial judge.

The employee testified through an interpreter that on April 7, 2002 he was employed by Building One Service Solutions as a floor cleaner. The job entailed spreading stripper on the floor, removing the old wax with a machine and then applying the new wax with another machine. These machines could weigh up to 400 pounds. During a normal work shift, the employee would be on his feet for eight (8) hours and bent or stooped over for at least four (4) hours.

On April 7, 2002, the employee was working an overnight shift cleaning the floors at Marshalls Department Store in Methuen, Massachusetts. He explained that after spreading the stripper on the floor, he put the mop he used off to the side and as he walked back to the machine

he was using to remove the wax, he slipped and fell, hitting his head. He was briefly unconscious. There were three (3) co-workers in the same room with him and they ran over to him after he fell. Despite this accident, the employee attempted to resume working his shift until he experienced nausea and problems with his vision just moments later.

The employee testified that he has no memory of anything for fifteen (15) to twenty (20) minutes after he fell. When he began to experience the nausea and vision problems, he again lost his memory for several minutes, although he recalled being taken from the work site in an ambulance. He was taken to Holy Family Hospital and Medical Center where he remained for two (2) days.

After being released from the hospital the employee saw Dr. Arturo Longobardi a few times until he was released back to work on April 29, 2002. He continued working until May 18, 2002 when he left work permanently because he could not tolerate the headaches, nausea, and blurred vision he was experiencing. He spent a night in the Fatima Unit of St. Joseph Hospital in Rhode Island on May 20, 2002.

Following his brief stay in Fatima, the employee began treating with a neurologist, Dr. William Golini, as well as Dr. Longobardi. Dr. Golini ordered an MRI of the brain as well as an EEG. The employee was also examined by Dr. Edward Feldmann at the request of the insurer. In the employee's opinion, he is not capable of returning to his job as a floor cleaner due to the severe headaches he still frequently experiences.

The employee testified that he remembered everything about April 7, 2002 up until he slipped and then he could not remember anything after that. However, he was certain that he lost his footing and slipped on the wet floor. He did recall feeling wet from the stripper on the floor.

Carlos Munoz, a co-worker of the employee, testified through an interpreter that he was working with Mr. Romero at the time of his fall. Mr. Munoz stated that the employee slipped on the wet floor and fell and that he saw blood coming from the back of the employee's head after the fall. Mr. Munoz was between eight (8) and ten (10) feet away at the time. There were two (2) other workers in the room, the lights were on and nothing was blocking Mr. Munoz's view of Mr. Romero.

At this point, the record reflects that Mr. Munoz's testimony became confused. It is impossible to determine whether this was due to a language barrier or an intentional evasion of the questions. There was a lengthy exchange between the witness, the attorneys and the trial judge as they tried to clarify whether Mr. Munoz actually saw the employee fall to the floor or he first heard the employee fall and then saw him on the floor. The judge eventually dismissed him from the stand out of frustration that they could not seem to get a clear answer from the witness.

Neil Archambault, a registered nurse employed at Holy Family Hospital, testified by deposition. At 1:45 in the morning on April 8, 2002, Mr. Archambault wrote down information from the Methuen Fire Department members who had brought the employee in. This initial history contained a statement that the employee had slipped while waxing a floor. At 2:25 a.m., Mr. Archambault spoke with the employee who indicated he woke up on the floor with his co-workers shaking him. The employee stated that he was uncertain if he passed out and then fell or if he slipped and hit his head and then passed out. Mr. Archambault indicated that the employee's English was not very good, but he felt that he could understand what he was talking about without the need for an interpreter.

The medical evidence consists of the records of the Methuen Ambulance/Fire Department, the Holy Family Hospital and Medical Center, St. Joseph Hospital/Fatima Unit, and

Dr. Arturo Longobardi. In addition, the parties submitted the depositions and records of Dr. William J. Golini and Dr. Edward Feldmann.

Dr. Golini, a neurologist, first saw the employee on June 18, 2002. On that day he took a history indicating the employee slipped and fell backward, hitting his head. There was some question as to loss of consciousness and amnesia. The employee complained of headaches and memory loss since the accident. There was no history of head trauma or frequent headaches prior to this incident at work. Dr. Golini diagnosed the employee with having sustained a concussive head injury resulting in postconcussive syndrome including headaches and memory loss. As of the June 2002 visit, the doctor felt the employee was temporarily totally disabled and incapable of returning to work. It was also his opinion that based upon the history provided to him by the employee, the diagnosis was causally related to the fall at work on April 7, 2002.

Dr. Golini ordered an EEG which revealed some abnormalities that would be consistent with concussive head injury. He stated that it seemed clear that the employee had sustained a head injury as a result of falling to the floor and hitting his head. He acknowledged that the issue was what caused him to fall. The doctor read some of the inconsistent histories recorded in the hospital records and stated that in his opinion, taking everything into account, a slip and fall was the most probable scenario. He noted that the bloodwork done at Holy Family Hospital did not raise any red flags, nor did the results of EKG testing and cardiac enzymes.

Dr. Feldmann, a neurologist, evaluated the employee on November 21, 2002 at the request of the insurer. The employee advised the doctor that on April 7, 2002, his friends told him that he slipped and fell at work and lost consciousness. Following the fall, the employee complained of continuous headache associated with nausea and dizziness, blurred vision and memory loss. The doctor's diagnosis was a mild closed head injury with loss of consciousness

and a brief period of posttraumatic amnesia. However, he stated in his report that he could not say whether the employee fell due to a fainting spell or because he slipped. He noted that the employee's complaints of persistent headaches and long term memory problems were not consistent with posttraumatic headache and postconcussive syndrome, although they may be related to Mr. Romero's complaints that he is depressed. Dr. Feldmann concluded that there was no physical reason why the employee could not return to his regular work.

Dr. Feldmann agreed that the diagnosis of a closed head injury could be causally related to the incident at work on April 7, 2002, if the employee's version of the incident, that he slipped and fell, was accurate. He also admitted that any statements he made regarding the possibility of a psychiatric disorder such as depression were outside his area of expertise and not to any reasonable degree of medical certainty.

The trial judge denied the employee's original petition noting there was a variance in the statements to the medical care providers concerning the issue of whether the employee slipped and fell or passed out and fell. He specifically relied upon the statement given by the employee to Mr. Archambault at the hospital on April 8, 2002, pointing out that this was the statement made closest in time to the incident and therefore, was the most reliable. The trial judge further cited the history given to Dr. Feldmann in support of his conclusion that the fall was idiopathic, and therefore, not compensable.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co. v Miguel, 509 A.2d 1002 (R.I. 1986).

The employee has filed two (2) reasons of appeal. In the first reason, the employee argues that the trial judge misconceived, overlooked and failed to accurately review the records of the Methuen Fire Department. After reviewing the decision of the trial judge, we must agree.

The parties introduced into evidence the one (1) page record of the Methuen Fire Department regarding their response to the scene of the incident in the early morning hours of April 8, 2002 and transport of the employee to the hospital. The report states that on their arrival they found the employee lying on a metal bar in the fetal position and the patient stated that he fell while waxing the floor, slipping on the wax. It further indicates that the patient stated that he changed his shirt, put his coat on and then walked to the area where he was found lying down.

Contrary to the trial judge's conclusion that the statement given by the employee to Mr. Archambault in the hospital was his first statement about the incident, it is obvious that the statements recorded by the Methuen Fire Department are from the employee and are the closest in time to the incident. There is no reference whatsoever to the Methuen Fire Department record in the trial judge's decision and therefore, we must conclude that he overlooked this piece of evidence. Thus, the trial judge was clearly wrong in relying on the statement made by the employee to Mr. Archambault as the closest in time to the incident and hence, the most reliable. Because this erroneous conclusion formed, in large part, the basis for his finding that the fall was idiopathic, we must conduct a *de novo* review of the evidence to determine whether such a finding is otherwise supported in the record.

After reviewing the record, we find that the evidence does not support a finding that this was an idiopathic fall. There is no evidence that the employee had ever experienced symptoms such as headache, dizziness, or nausea at any time, including the last few minutes, prior to the accident that would indicate that he was susceptible to fainting or passing out as a result of any

kind of pre-existing condition. There was no indication that he was overcome by fumes or odors from any chemicals or cleaning materials that were being used at the time. There was nothing in the medical evaluation and testing done at the hospital that evening to indicate that he was suffering from a medical condition that could cause him to faint. The employee testified that he was walking in the area where he had spread a liquid substance to remove the wax when he fell. He stated that he distinctly recalled that his clothing was wet from the liquid after he fell. Frankly, all of these factors preponderate in favor of a finding that the employee slipped on the liquid used to remove the wax and fell to the floor, hitting the back of his head.

Obviously, the incident happened very quickly. The trauma to the employee's head caused him to lose consciousness for some period and, according to Dr. Feldmann's diagnosis, he experienced some posttraumatic amnesia. It would not be inconceivable then for the employee's memory of exactly what happened during this incident to be impaired. Unfortunately, his impaired memory resulted in some variation in the history he related to the various medical providers, particularly when he forthrightly stated that he had no memory of the event and his co-workers told him what happened. The mere lack of memory does not lead to an automatic inference that the fall was idiopathic. Considering all of these factors together, the preponderance of the evidence weighs in favor of a finding that the employee slipped in the liquid he had spread on the floor to remove the wax. His injury is, therefore, compensable.

Mr. Romero was hospitalized until April 9, 2002 following his injury. Thereafter, he was out of work on the advice of Dr. Longobardi. The doctor released him to return to work on April 29, 2002. The employee returned to his regular job from April 29, 2002 to May 18, 2002, at which time he stopped working due to ongoing symptoms resulting from his injury. He sought medical attention at St. Joseph Hospital/Fatima Unit and was advised to remain out of work until

May 23, 2002 and see a neurologist. His attorney apparently sent him to Dr. Golini for evaluation. Dr. Golini maintained that the employee was partially disabled due to the effects of the fall at work. He last saw the employee on January 23, 2003.

When Dr. Feldmann evaluated the employee on November 21, 2002, he concluded that the symptoms and complaints of the employee at that time, particularly the persistent headaches and cognitive problems with long-term memory, were not the result of the mild closed head injury he suffered on April 7, 2002. He explained that the fact that the employee continued to complain of headaches more than six (6) months after the incident and his long-term memory problems were not consistent with the normal course of post-concussive syndrome and mild closed head injury. The doctor further stated that there was no physical reason why the employee should not be able to return to his regular employment. We find that his testimony regarding the effects of the employee's injury and the cause of his current complaints and condition are most persuasive and probative. The medical evidence, therefore, supports a finding that the employee was partially disabled from April 8, 2002 through April 28, 2002 and from May 19, 2002 through November 21, 2002.

In light of our decision to reverse the trial judge's decision based upon the employee's first reason of appeal, we need not address the second reason of appeal. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee sustained a personal injury, specifically a mild closed head injury with postconcussion syndrome, on April 7, 2002 arising out of and in the course of his employment, connected therewith and referable thereto, of which the respondent had knowledge.

2. That the employee's average weekly wage is Two Hundred Eighty-four and 40/100 ($284.40) Dollars.

3. That the employee received some Temporary Disability Insurance benefits.

4. That the employee was partially disabled from April 8, 2002 through April 28, 2002 and from May 19, 2002 through November 21, 2002.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from April 8, 2002 through April 28, 2002 and from May 19, 2002 through November 21, 2002.

2. That the employer shall reimburse the Temporary Disability Insurance fund for any benefits received by the employee during the periods of incapacity stated above and shall take credit in that amount against any benefits due to the employee pursuant to this decision and decree.

3. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury he sustained on April 7, 2002.

4. That the employer shall reimburse the employee's counsel the sum of Two Hundred Twenty-one and 30/100 ($221.30) Dollars for the cost of the deposition of Dr. William Golini and Seventy-six and 25/100 ($76.25) Dollars for the cost of a copy of the deposition of Dr. Edward Feldmann.

5. That the employer shall reimburse the employee's counsel the sum of One Hundred Twenty-five and 00/100 ($125.00) Dollars for interpreting services provided by Yorian M. Contreras on September 6, 2002 and shall reimburse the employee's counsel for the cost of interpreting services provided by Anna C. Marrin on December 11, 2002 upon presentation of the cost of such services and proof of payment of the same.

6. That the employer shall reimburse the employee's counsel the sum of Three Hundred Forty-five and 00/100 ($345.00) Dollars for the cost of the filing of the Original Petition, the filing of the appeal and the transcript of the trial proceedings.

7. That the employer shall pay a counsel fee in the sum of Five Thousand Five Hundred and 00/100 ($5,500.00) Dollars to Albert J. Lepore Jr. Esq., for services rendered at the pretrial and trial levels, and the additional sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Albert J. Lepore, Jr. Esq., for services rendered in the successful prosecution of the employee's appeal.

We have prepared and submit herewith a new decree in accordance with our decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

Bertness and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Bertness, J.

_____
Connor, J.

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BUILDING ONE SERVICE SOLUTIONS	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee from a decree entered on May 1, 2003.

Upon consideration thereof, the appeal of the employee is granted, and, in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee sustained a personal injury, specifically a mild closed head injury with post-concussion syndrome, on April 7, 2002 arising out of and in the course of his employment, connected therewith and referable thereto, of which the respondent had knowledge.

2. That the employee's average weekly wage is Two Hundred Eighty-four and 40/100 ($284.40) Dollars.

3. That the employee received some Temporary Disability Insurance benefits.

4. That the employee was partially disabled from April 8, 2002 through April 28, 2002 and from May 19, 2002 through November 21, 2002.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from April 8, 2002 through April 28, 2002 and from May 19, 2002 through November 21, 2002.

2. That the employer shall reimburse the Temporary Disability Insurance fund for any benefits received by the employee during the periods of incapacity stated above and shall take credit in that amount against any benefits due to the employee pursuant to this decision and decree.

3. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury he sustained on April 7, 2002.

4. That the employer shall reimburse the employee's counsel the sum of Two Hundred Twenty-one and 30/100 ($221.30) Dollars for the cost of the deposition of Dr. William Golini and Seventy-six and 25/100 ($76.25) Dollars for the cost of a copy of the deposition of Dr. Edward Feldmann.

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and trial levels, and the additional sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Albert J. Lepore, Jr. Esq., for services rendered in the successful prosecution of the employee's appeal.

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Connor, J.

I hereby certify that copies were mailed to Alfredo T. Conte, Esq., and Jessica L. George, Esq., on

_____